

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WAYNE JAMES OLIPHANT,

Plaintiff

vs.

PENNSYLVANIA B.P.P., *et al.*,

Defendants

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CIVIL NO. 1:CV-13-1490

(Judge Caldwell)

*M E M O R A N D U M*

I. *Introduction*

Wayne Oliphant, a former state inmate, proceeds *pro se* and *in forma pauperis* in this matter. On October 15, 2013, the court dismissed Oliphant's action for failure to file an amended complaint. On November 8, 2013, Oliphant filed a motion for extension of time and for appointment of counsel. (Doc. 9). The court will construe the November 8 filing as a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e).

II. *Standard of Review*

Pursuant to Fed. R. Civ. P. 59(e), "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." A motion for reconsideration is a limited vehicle used "to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677. Therefore, a proper Rule 59(e) motion must be based on an intervening change in controlling law, the availability of new evidence or the need to correct a clear error of law or prevent manifest injustice. *Wiest v. Lynch*, 710 F.3d 121, 128 (3d Cir. 2013)(citing *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010)).

### III. *Background and Discussion*

On September 13, 2013, the court granted Oliphant's request to proceed *in forma pauperis*, but dismissed his Complaint on screening pursuant to 28 U.S.C. § 1915(e)(2)(B) due to his failure to state a claim on which relief could be granted against the named defendants (the Pennsylvania Bureau of Probation and Parole, the Pennsylvania Department of Corrections; and the Bureau of Health Care Services for the Pennsylvania Department of Corrections). See Doc. 5. Oliphant was granted twenty-one days to file an amended complaint or his action would be dismissed. (*Id.*) Six days later, Oliphant notified the Court of his new address in East Orange, New Jersey. See Doc. 6. On October 15, 2013, Oliphant's case was dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) after he failed to file an amended complaint within the time frame set by the court, and likewise, failed to seek an enlargement of time to do so. See Doc. 8.

In his present motion, Oliphant claims he sent the court a letter "about a month ago" seeking an extension of time to file his amended complaint (Doc. 9). No such request is docketed in this case. As noted, the case was dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) as forewarned. See Doc. 5. As Oliphant filed his present motion within 28 days of the dismissal of his case, the court may alter or amend the judgment in this case to prevent manifest injustice. Plaintiff may have been waiting for the court's resolution of a motion for enlargement of time to file his amended complaint, which for whatever reason failed to reach the court. Since he acted relatively promptly after the October 15 dismissal, we will reopen the case, and Plaintiff will be granted another opportunity to file an amended complaint.

The court, however, will deny his motion for counsel. It is impossible for the court to assess the arguable factual or legal merit of Oliphant's claims until a viable amended complaint is filed. Thus under *Tabron v. Grace*, 6 F.3d 147, 155-57 (3d Cir. 1993), the motion for counsel will be denied.

An appropriate order follows.

/s/ William W. Caldwell  
William W. Caldwell  
United States District Judge

Date: December 3, 2013

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*O R D E R*

AND NOW, this 3rd day of December, 2013, upon consideration of Plaintiff's Motion (Doc. 9) for extension of time to file his amended complaint and motion for appointment of counsel , it is ORDERED that:

1. The motion is construed as a Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e) and is GRANTED.

2. The October 15, 2013, Order (Doc. 8) is vacated and the Clerk of Court shall reopen the case.

3. Plaintiff has twenty-one (21) days from the date of this order to file an amended complaint in accordance with this court's order of September 13, 2013. (Doc. 5).

4. Plaintiff's failure to file an amended complaint as directed within the required time will result in this action being dismissed pursuant 28 U.S.C. § 1915(e)(2)(B)(ii).

5. Plaintiff's motion (Doc. 9) for the appointment of counsel is DENIED.

/s/ William W. Caldwell  
William W. Caldwell  
United States District Judge